Supreme Court, U.S.
FILED

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No. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term. 1997

FLOTILLA, INC., a Florida Corporation,
Petitioner,

vs.

FLORIDA GAME AND FRESHWATER FISH COMMISSION, CITY OF BRADENTON, FLORIDA, DONALD WOOD, Individually and as Endangered Species Coordinator, Florida Game and Freshwater Fish Commission, FRANK MONTLABANO, III, Frank Montalbano, III Individually and as Director of Division of Wildlife, Florida Game and Freshwater Fish Commission, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED FOR REVIEW—

I. Whether the Eleventh Amendment to the United States Constitution divests the Federal Courts of jurisdiction to hear a suit by a citizen of the State of Florida against the State for taking his or her property without due process of law in violation of the Fifth and Fourteenth Amendments to the Federal Constitution, specifically where the state's highest court has determined that such an action is not a suit against the state for sovereign immunity purposes?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit. There is no parent or subsidiary company of any party listed. The only party remaining to this appeal is the Florida Game and Freshwater Fish Commission.

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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Flotilla, Inc., the petitioner herein, respectfully prays that a writ of certiorari be issued for review of the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled case on May 16, 1997.

OPINIONS BELOW

The May 16, 1997 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is unpublished and is referenced in the Federal Reporter at 116 F.3d 491 (11 Cir. 1997). The case number is 96-2066, and is reprinted in the separate Appendix to this Petition, page 1a. The prior opinion of the United States District Court for the Middle District of Florida, entered December 14, 1995, is unpublished. The case number is 91-1875-CIV-T-21C and is reprinted in the separate Appendix to this Petition, page 6a.

STATEMENT OF JURISDICTION

The judgement of the Court of Appeals was entered on May 16, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

U.S. Constitution Amendment V:

No person shall be held to answer for a capital, or

otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added)

U.S. Constitution Amendment XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Constitution Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

Florida Constitution Article I, Section 9:

Due Process.
No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy

for the same offense, or be compelled in any criminal matter to be a witness against himself.

Florida Constitution Article X, Section 6:

> **Eminent Domain.**
> (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
> (b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

STATEMENT OF THE CASE

This is an action brought by Flotilla, Inc., a Florida corporation (hereinafter referred to as "Flotilla") against the Florida Game and Freshwater Fish Commission (hereinafter referred to as "Commission"), pursuant to the Fifth Amendment of the United States Constitution, as applied to the states through the Due Process Clause of the Fourteenth Amendment, which protects property owners by guaranteeing that private property will not be taken for public use without just compensation.

MATERIAL FACTS

The facts before the Trial Court and the Circuit Court on appeal

on Summary Judgement which the respective courts had to view in light most favorable to Flotilla are as follows[1]:

In September 1984, Flotilla paid $3,000,000.00 for a 176-acre tract within the city limits of the City of Bradenton (hereinafter referenced as the "City"). Prior to closing, the Property was zoned planned development and had received approvals from the City of a Preliminary Development Plan and a Preliminary Plat. After minor amendments, the Preliminary Development Plan/Plat allowed the development and subdividing of the tract for the construction of 793 residential dwelling units in six (6) phases to be known as River Bend. The name was later changed to Braden River Lakes, which shall hereinafter be referred to as the "Project".

The Project was adjacent to River Isles, a residential golfing community, long since built out, also in the City limits. The Property for the Project was open pasture-type property, with less than thirty (30) large pine trees scattered across the Property. Repeated investigations by Flotilla, City planning officials, engineers, land planners and environmental specialists showed no impediments to development as

[1] Jameson v. Arrow Company, 75 F.3d. 1528 (11th Cir. 1996).

approved, and no eagles' nests. In reliance on the investigation and land use approvals, Flotilla purchased the Property and began its development.

After the purchase, Flotilla continued engineering, planning, permitting and construction of the Project. Flotilla employed land planners, engineers, environmental specialists and contractors. Flotilla's plans were to build the main infrastructure and recreation area, plan and engineer the remainder, and then sell the individual phases to actual builders and developers of homes and home sites. As of December 1987, the planning, permitting and construction of the Property was substantially underway.

Phase IA, which included the main service road for the entire development, the recreation area for the entire development and the main utility lines for the entire development, had received Final PDP approval and various state agency permits (e.g. HRS, DER, SWFWMD) had been substantially constructed by Flotilla. Phase I had received construction and final approval from the City and was under an option to sell to Centex Homes. Phase II had been sold to Centex Homes, had received Final PDP approval from the City, and construction of the

infrastructure was completed with homes being built. Phase III had received construction approval and application had been made for a Final PDP plan. Phase IV had received construction approval. Phases V and VI were scheduled for later development.

Approvals from the City and all State agencies, DER, HRS and SWFWMD, necessary for each phase at that phase's stage of development had been approved. Construction, as approved by the City and State agencies, was in conformance with the land's permitted use and was well underway. Additionally, by this time Flotilla had secured mortgage loans totaling $9,000,000.00 for the purchase and construction associated with the Project and the neighboring Braden Commercial Center.

In November 1987 during construction, two (2) eagles chose to build a nest on the Project. On December 29, 1987, and in response to a report that the nest had been destroyed, the Commission arrived at the Project armed and ready to enforce regulations. Through their representatives they ordered everyone off the Property within 750 feet of the nest, ordered everyone to cease all construction activities therein, and physically took control of said Property. The area around the nest

was cordoned off with "Crime Scene" tape. The Commission informed Flotilla that it had also found that the eagles had partially constructed a second nest in Phases V and VI.

The Commission, which is established as an independent regulatory and executive entity pursuant to Article IV, Section 9, of the Florida Constitution, in enforcement of the Habitat Management Guidelines for the Bald Eagle in the Southeast Region ("Guidelines"), established a protective zone around the two (2) nests of 750 feet in radius, within which no activity could take place, or else the violators would be subject to criminal prosecution for harassing or molesting the eagles. The Commission informed as many construction workers as they could find of the Guidelines and that there was to be no activity within 750 feet of the nests.

The Guidelines clearly state that the construction activity already taking place within those areas on December 29, 1987 would not be permitted, and the Commission made it clear that violation would result in criminal prosecution. The Commission informed Flotilla of the Guidelines and the effect of the construction or other activities on the eagles and the consequences.

The economic effect of the Commission's actions were absolutely disastrous to Flotilla. Flotilla could not use its property other than for the eagle preserve, as set up by the Commission, without the fear of prosecution.

RULINGS BELOW

The Federal Court action was brought by Flotilla on December 26, 1991 in the United States District Court for the Middle District of Florida. Flotilla previously filed an inverse condemnation action on July 2, 1990 against the Commission and the City of Bradenton, in the Circuit Court of the Twelfth Judicial Circuit, Manatee County, Florida, based upon facts emanating from the same transaction. A Non-Jury Trial was held in the State Court proceeding and an Order was entered on February 2, 1993 finding that the Commission's actions constituted a taking. The Second District Court of Appeal of Florida reversed the decision and denied Flotilla's Motion For Rehearing on May 27, 1994. The Florida Supreme Court denied Certiorari on October 5, 1994.

On May 11, 1992, the Commission filed a Motion To Dismiss Flotilla's Federal Court Complaint. On June 5, 1992, the City of

Bradenton (a Defendant in the Trial Court but not a party to the Appeal or this Petition for Certiori) filed a Motion To Abate. The Trial Court entered an Order on July 27, 1992, denying the Motion To Dismiss and the Motion To Abate, in which it recognized that Flotilla had a due process taking claim.

On July 26, 1993, the Commission filed a Motion For Summary Judgment, in which it asked the Trial Court to grant a Summary Judgment on Flotilla's 42 U.S.C. 1983 and equal protection claims against the Commission, and the officers of the Commission in their individual capacities, claiming sovereign immunity and qualified immunity. It did not address Flotilla's due process taking claim.

On August 27, 1993, the Trial Court stayed the action in its entirety pending resolution of the State Court action. On December 5, 1994, the Commission filed an Amended Motion For Summary Judgment supplementing the Motion For Summary Judgment based on res judicata and 28 U.S.C. 1738 due to resolution of the State Court action on October 5, 1994. The Amended Motion For Summary Judgment did not address Flotilla's due process taking claim.

On January 13, 1995, the Court entered an Order on the

Commission's Motion For Summary Judgment and Amended Motion For Summary Judgment. The Order granted the Commission's Motions with regard to Flotilla's 42 U.S.C. 1983 and equal protection claims finding that the Commission is an arm of the State and that the individual officers had qualified immunity in their individual capacities. The Order denied the res judicata and 28 U.S.C. 1738 claims finding that Flotilla had properly reserved a due process taking claim in the Federal Court. The January 13th Order also vacated the stay entered on August 27, 1993.

On February 2, 1995, Flotilla filed a Motion To Lift Abatement of its due process taking claim. The Trial Court, on June 1, 1995, entered an Order granting the City of Bradenton's Motion For Summary Judgment (previously filed on February 3, 1995), and in the same Order denied Flotilla's Motion To Lift Abatement of its due process taking claim. On June 15, 1995, Flotilla filed a Motion To Alter Or Amend the June 1, 1995 Order. In response thereto, on September 18, 1995 the Trial Court entered an Order stating Flotilla's "due process taking claim against the Commission shall be deemed to remain for [the Trial] Court's consideration".

On September 25, 1995, the Commission filed a Suggestion Of Mootness, Or In The Alternative, Motion For Summary Judgment Due To State's Eleventh Amendment Immunity. On October 6, 1995, Flotilla objected to the Commission's Suggestion Of Mootness and filed a Motion To Set Cause For Trial. In addition, Flotilla filed sworn testimony in opposition thereto.

On October 30, 1995, the Trial Court ordered the filing of Supplemental Briefs with regard to Eleventh Amendment immunity. Flotilla and the Commission complied with the request. On December 11, 1995, the Trial Court ruled that Flotilla's "due process taking claim . . . is barred by the Eleventh Amendment" and entered Judgment in favor of the Commission.

Flotilla appealed the decision to the United States Court of Appeals for the Eleventh Circuit claiming that there was no sovereign immunity in the State of Florida for Due Process taking and therefore, a suit against the State on that basis is not barred by the Eleventh Amendment. On May 16, 1997, the United States Court of Appeals ruled that the Eleventh Amendment bars Flotilla's claim against the Commission and entered Judgment in favor of the Commission. This

petition follows.

REASONS FOR GRANTING THE WRIT

I. The decision of the United States Court of Appeals for the Eleventh Circuit in the case at bar is in conflict with the following decisions to the extent that it holds that the status of the entity being sued, as opposed to the status of state law, determines whether or not a suit is against the state for Eleventh Amendment purposes:

> Ford Motor Co. v. Department of Treasury of State of Indiana, 65 S.Ct. 347, 323 U.S. 459 (1945).
>
> Aerojet-General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971).
>
> State Road Department v. Tharp, 1 So.2d 868 (Fla. 1941).

The decision of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") in the case at bar is erroneously based on the following conclusion by the Court: "whether a suit is one against the state is a question based upon the status of the entity, not the subject matter of the lawsuit." (App. A., 3a).

The Eleventh Circuit decision which puts emphasis on the "status of the entity" conflicts with the rule of law promulgated in the above cases that put emphasis on the status of the state law of the state in question. Furthermore, it grants to the state sovereign immunity merely because it is a state, where sovereign immunity otherwise does not exist. As stated in Aerojet-General Corp. v. Askew, 453 F.2d 819 (5th Cir. 1971):

> "Mr. Justice Reed, speaking for the Court in Ford Motor Company, supra, laid down a two-step test for the existence of an Eleventh Amendment immunity from suit in federal court: (1) whether the action is against the state, and (2) if the action is against the state, whether the state consented to be sued in the federal courts. 323 U.S. at 462, 65 S.Ct. at 349, 89 L.Ed. at 393. The Court indicated that, in answering the first inquiry, a federal court was to look to the law of the appropriate state for guidance. 323 U.S. at 463, 65 S.Ct. at 350, 89 L.Ed. at 394." Id. at 828.

The basis for determining whether or not the Eleventh Amendment is a bar to a suit in Federal Court against a state or one of its agencies is whether or not state sovereign immunity exists. This is determined not by looking at the status of the entity but by looking to state law. Aerojet-General Corp. Id. at 828. In the case at bar, the status of state law as determined by the Florida Supreme Court is set forth in State

Road Department v. Tharp, 1 So.2d 868 (Fla. 1941). According to the Supreme Court of Florida in Tharp, a suit against a state for deprivation of property without due process of law is not a suit against the state for purposes of sovereign immunity. Id. at 870.

The Eleventh Amendment, on its face, does not include an express prohibition against suits by a citizen of a state against their state in Federal Court. In years past, citizens of states have attempted to read into the Eleventh Amendment, by its silence, the right to bring such suit against their own state. This Court in Hans v. Louisiana 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), made it clear it would not create such a right and thereby abrogate the sovereign immunity existing and held by the states when they entered the Union, merely because the Eleventh Amendment was silent on that issue. The Hans decision has thus created the rule that where a state has sovereign immunity, a citizen of that state cannot bring a suit against that state in Federal Court. Therefore, the first and primary question to be asked in any suit which involves a question of Eleventh Amendment immunity is whether or not the suit is one against the state for sovereign immunity purposes. In order to answer that question the Court must look to state law.

Aerojet-General Corp. supra.

This rule of law has its roots in Hans and has been accepted by this Court, as well as lesser Federal Courts. The decision in the present case by the Eleventh Circuit conflicts with this rule for determining whether or not the Eleventh Amendment applies. Instead of determining whether state sovereign immunity exists in accordance with the law of each state, the Eleventh Circuit is requiring that the characteristics of the entity being sued make the determination. In other words, the decision divests the states of the ability to determine themselves whether a suit is against the state for Eleventh Amendment purposes. Sovereign immunity exists by virtue of state law. The concept of looking to state law is a concept accepted by this Court. Ford Motor Co. v. Department of Treasury of State of Indiana, 65 S.Ct. 347, 323 U.S. 459 (1945).

By deciding that application of the Eleventh Amendment is dependent on the status of the entity, the Eleventh Circuit has taken away the individuality of the several states in determining what constitutes a suit against the state. The Eleventh Circuit renders unnecessary the efforts of Federal Courts in cases such as People of

Colorado v. District Court of United States for District of Colorado, 207 F.2d 50 (10th Cir. 1953). In that case, the Court looked to Colorado law to determine if a takings claim was against the State, just as the Eleventh Circuit should have looked to Florida law to determine whether Flotilla's claim was against the State of Florida.

In the Flotilla decision, the Eleventh Circuit did not look beyond the status of the entity. What this means is that it makes no difference as to the "nature of the proceeding." The Eleventh Circuit decision that the "subject matter" of the suit does not control is in direct conflict to this Court's decision in Ford Motor Co, supra, which called for courts to make a determination based on the "essential nature and effect of the proceeding." Id. at 464.

The Eleventh Circuit by virtue of enacting a requirement that the status of the entity controls whether or not sovereign immunity exists is holding that the Eleventh Amendment has created a new right in the State of Florida even though the Eleventh Amendment is silent on that issue. The Eleventh Circuit is creating sovereign immunity for the State of Florida where the State of Florida's highest Court has determined that none exists. Tharp, supra.

II. This case involves an important question of Federal law that has not been settled.

This Court has addressed the Eleventh Amendment in various cases but has not addressed the issue; whether or not, where a state has held by its highest court that no sovereign immunity exists for due process takings claims, that state can be sued by its citizens in Federal Court for an unconstitutional taking pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

The basis for the action is not dependent upon 42 U.S.C. 1983 but derives directly from the Fifth and Fourteenth Amendments to the Constitution. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California, 107 S.Ct. 2378, 2386, 482 U.S. 304, 96 L.Ed. 2d 250 (1987).

Although this Court has not specifically ruled in this regard, this issue has been addressed by a District Court within the State of Florida in the case of Cobb Coin Co. v. Unidentified Wrecked & Abandoned Sailing Vessel, 549 F. Supp. 540 (S.D. Fla. 1982). In Cobb Coin Co. v. Unidentified Wrecked & Abandoned Sailing Vessel, 549 F. Supp. 540 (S.D. Fla. 1982), the District court observed that "whether an action is

one against the state is determined by reference to state law." Id. at 552. The Cobb court concluded that the rule in Tharp, regarding sovereign immunity, is "direct support for determining what constitutes a suit against the State for Eleventh Amendment purposes." Id. at 553, relying on Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 459 F.Supp. 507 (S.D. FL 1978), aff. 621 F.2d 1340 (5th Cir. 1980), affirmed in part & rev'd on other grounds 458 U.S. 670, 102 S.Ct. 3304 (1982). As stated in Cobb:

> "Thus Tharp is a recognized exception under Florida law defining what constitutes a suit against the State for purposes of sovereign immunity and, it follows, for purposes of the Eleventh Amendment." Id. at 553, n.12.

The Eleventh Circuit did not address this aspect of Flotilla's argument. It made no reference to the Cobb opinion. The Cobb case stands for the correct principal, i.e., that the Court must look to state law and the subject matter of the suit, not the status of the entity in determining whether or not it is a suit against the state.

Although the argument contained in this petition to this point, addresses the narrow issue of whether or not a suit may be entertained in Federal Courts against a state, where the state has found that the

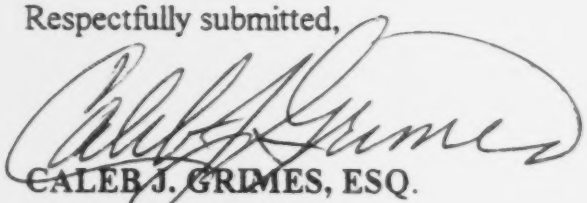
action is not one against the state for sovereign immunity purposes, the matter before this Court has broader implications.

Assume that a state has found that a takings claim is in fact a suit against the state for purposes of sovereign immunity. If so, the effect of the Eleventh Circuit ruling is to hold that the Federal Courts cannot redress an unconstitutional taking by a state of its citizen's property. If a state chooses to allow takings in violation of the Federal Constitution (as in this case), a citizen has no federal remedy. In effect, the Eleventh Amendment is being interpreted to override the Fifth and Fourteenth Amendments and render them ineffective as protections in Federal Courts for a citizen against his or her state.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,



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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED MAY 16, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2066

D.C. Docket No. 91-1875-CIV-T-21C

FLOTILLA, INC., A Florida Corporation,

Plaintiff-Appellant

versus

FLORIDA GAME AND FRESHWATER FISH COMMISSION, DONALD WOOD, Donald Wood, Individually and as Endangered Species Coordinator, Florida Game and Freshwater Fish Commission. FRANK MONTALBANO, III, Frank Montalbano, III Individually and as Director of Division of Wildlife, Florida Game and Freshwater Fish Commission, et al.,

Defendants-Appellees,

CITY OF BRADENTON,

Defendant.

Appeal from the United States District Court for the Middle District of Florida

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(May 16, 1997)

Before COX, Circuit Judge, KRAVITCH, Senior Circuit Judge, and STAGG*, Senior District Judge.

PER CURIAM:

* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

Flotilla, Inc. sued the Florida Game and Freshwater Fish Commission ("Commission") and some of its officials in their official and individual capacities after the Commission established protective zones around two bald eagle nests located on Flotilla's property. Flotilla alleged that the Commission impaired its Fifth and Fourteenth Amendment due process rights in violation of 42 U.S.C. §1983 and interfered with its contracts and business relationships in violation of Florida law.[1] The district court granted summary judgment against Flotilla, holding that the Eleventh Amendment to the United States Constitution barred the action.[2] We affirm.[3]

[1] Prior to this action, Flotilla brought an unsuccessful inverse condemnation action against the Commission in state court. The outcome of that case does not now have a preclusive effect because Flotilla made a Jennings reservation on the record in the state court. See Jennings v. Caddo Parish School Bd., 531 F.2d 1331, 1332 (5th Cir. 1976) ("[H]ad appellant wished to reserve her constitutional claims for subsequent litigation in federal court, she could have done so by making on the state record a reservation to the disposition of the entire case by state courts.").

[2] Flotilla only appeals the summary judgment entered in favor of the Commission and the Commission officials in

The Eleventh Amendment provides immunity to states from suits brought by individuals in federal courts unless Congress has abrogated the immunity or the state being sued has waived the immunity. Gamble v. Florida Dept. of Health and Rehab. Servs., 779 F.2d 1509, 1511 (11th Cir. 1986) (citing Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504 (1890)). Flotilla does not argue that Congress abrogated the Commission's immunity or that Florida has waived the Commission's immunity. Rather, Flotilla argues that under Florida law, a "takings" suit is not a "suit against the state," and, therefore, the Eleventh Amendment is inapplicable. We reject this argument as misguided. Whether a suit is one "against the state" is a question based on the status of the entity, not the subject matter of the lawsuit.

Flotilla alternatively argues that the Commission is not an "arm of the state" and, therefore, does not enjoy Eleventh Amendment immunity. The Eleventh Amendment applies to states and "arms of the

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their official capacities. It does not appeal the summary judgment entered in favor fo the officials in their individual capacities.

[3] We deny the Commission's motion for sanctions and attorney fees against Flotilla's counsel.

states," but not to municipal corporations, counties, or other political subdivisions of the state. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280, 97 S.Ct. 568, 572 (1977). We evaluate two factors to determine whether an entity is an arm of the state entitled to Eleventh Amendment immunity: (1) the state's degree of control over the entity, and (2) the entity's degree of fiscal autonomy. Fouche v. Jekyll Island-State Park Auth., 713 F.2d 1518, 1520 (11 Cir. 1983). A lack of fiscal autonomy cuts in favor of Eleventh Amendment immunity because such immunity serves to protect state sovereignty by avoiding federal court-ordered recovery from state funds. See Edelman, 415 U.S. at 663, 94 S.Ct. at 1356.

Florida exerts significant control over the Commission, as evidenced by the Commission's composition and mission. The Commission is composed of members appointed by the governor, and its mission is to "exercise the regulatory and executive powers of [Florida] with respect to wild animal life and fresh water aquatic life." Fla. Const. Art. 4 §9. In Fouche, we held that Georgia exercised significant control over the Georgia Park Authority in part because it was composed of state officials and members appointed by the

governor. Fouche, 713 F.2d at 1520.

Also, the Commission lacks fiscal autonomy. The Florida Legislature reviews and acts upon the Commission's annual budget, and the Commission "may not obligate itself beyond the current resources of the state game trust fund unless specifically so authorized by the Legislature." Fla. Stat. § 372.09 (1995). This budget arrangement implies that Florida would be responsible for any of the Commission's debts that could not be paid out of its revenues. See Fouche, 713 F.2d at 1521 ("[B]ecause the park Authority's budget is submitted to the General Assembly, presumably the state would be responsible for any debts incurred by it that could not be paid out of its revenues.").

Since the Commission lacks fiscal autonomy and Florida exercises significant control over the Commission, we conclude that the Commission is an arm of the state and that a suit against the Commission is effectively a suit against Florida. Therefore, the Eleventh Amendment bars Flotilla's claim against the Commission.

AFFIRMED.

APPENDIX B - MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FILED DECEMBER 14, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FLOTILLA, INC., a Florida corporation,

Plaintiff,

V. CASE NO. 91-1875-CIV-T-21C

FLORIDA GAME AND FRESH WATER COMMISSION, CITY OF BRADENTON, FLORIDA, DONALD WOOD, Individually and as Endangered Species Coordinator, Florida Game & Fresh Water Fish Commission, FRANK MONTALBANO, III, Individually and as Director of Division of Wildlife, Florida Game & Fresh Water Fish Commission, and BRIAN MILLSAP, Individually and as Regional Non-Game Wildlife Biologist, Florida Game & Fresh Water Fish Commission,

Defendants.

_____/

ORDER

This cause comes before the Court on two pending motions: (1)

Defendant's Suggestion of Mootness, or In the Alternative, Motion for Summary Judgement Due to State's Eleventh Amendment Immunity (Dkt. 90) and Plaintiff's response (Dkt. 92) in opposition thereto; (2) Plaintiff's Motion and Notice to Set Cause for Trial (Dkt. 93) and Defendant's response (Dkt. 95) in opposition thereto.

This Court has previously found that Plaintiff made a valid Jennings reservation in state court in order to make known its intent to bring federal claims in federal court should the state court, applying state law, find adversely to them. See January 13, 1995 Order (Dkt. 72). The parties' dispute herein concerns the specific question, not yet considered by this Court, of whether the Eleventh Amendment bars the claims against the state or an agency of the state for alleged violations of due process under the Fifth and Fourteenth Amendments of the constitution. This Court finds that the Eleventh Amendment does bar action for violations of due process against the Defendant state agency, the Florida Game and Fresh Water Fish Commission ("Commission").

Plaintiff alleges that it had purchased and substantially developed property and had secured mortgage loans totaling $9,000,000.00, and that on December 29, 1987, in response to a report that an eagle's nest

had been destroyed on the Plaintiff's property, Defendant Commission physically took control of the property. Plaintiff states that the Commission established a protective zone around two eagles' nests of 750 feets in radius pursuant to the Habitat Management Guidelines for the Bald Eagle in the Southeast Region. Plaintiff maintains that the Commission's actions constituted a taking and caused a disastrous economic effect to Plaintiff for which Plaintiff has not been compensated. (Dkt. 96). The Defendant Commission asserts that it is immune to such an action under the Eleventh Amendment.

Generally, an unconsenting state is entitled to immunity from suit. U.S. CONST. amend. XI; Florida Dept of State v. Treasure Salvors, Inc., 458 U.S. 670, 684 (1982). The Eleventh Amendment has been interpreted to protect an uncontesting state from suit by its own citizens for both damages and injunctive relief. Hans v. Louisiana, 134 U.S. 1 (1890). The Eleventh Circuit has stated that, "Absent a legitimate abrogation of immunity by Congress or a waiver of immunity by the state being sued, the Eleventh Amendment is an absolute bar to suit by an individual against a state or its agencies in federal court." Gamble v. Florida Department of Health and Rehabilitative Services,

779 F.2d 1509 (11th Cir. 1986). Further, it does not necessarily follow from a state's waiver to be sued in state court that the state consents to suit in federal court. See Terrel v. United States, 783 F.2d 1562, 1565 (11th Cir. 1986).

The Court must determine whether there is congressional abrogation of immunity or a waiver of immunity by the State of Florida. In support of its position that its due process claim is not barred by the Eleventh Amendment, Plaintiff quotes Cobb Coin Co., Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 549 F.Supp. 540 (S.D. Fla. 1982): "The law of Florida is that an action for relief from actions of a State agency which violate the constitution is not 'a suit against the State' such as would be barred by the doctrine of sovereign immunity." Id. at 553, citing State Road Dept. v. Tharp, 1 So.2d 868 (1941). Plaintiff overlooks, however, the court's finding in Cobb that "Tharp is a recognized exception under Florida law defining what constitutes a suit against the State for purposes of sovereign immunity and, it follows, for purposes of the Eleventh Amendment." Id. at 553 n. 12. The Court in Cobb found that there was no Eleventh Amendment bar in that case because the plaintiff in Cobb had no recourse to the

courts of Florida to enforce its federal rights, as Florida courts would not assume jurisdiction to determine a salvage award. Id. at 533 n. 13 (citations omitted). The court reasoned that "[t]here is federal jurisdiction to adjudicate an allegedly unconstitutional taking of property by a state where there is no other remedy by which the plaintiff may recover compensation for the taking." Id. (citation omitted).

In the instant case, the Court finds first that, unlike the plaintiff in Cobb, Plaintiff herein had a state court remedy by which Plaintiff could recover compensation for the alleged taking: a just compensation claim. This Court has previously noted that, for purposes of applying Florida's merger and bar rules, the just compensation claim and the federal takings claim are "essentially the same." See January 13, 1995 Order (Dkt. 72, p. 7), citing, Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299, 1308 (11th Cir. 1990). Further, the Court finds no congressional authority granting power in a federal court to require the state to make payment of funds for the due process taking claim asserted in this case. See Orange Ridge, Inc. v. State of Florida, 696 F.Supp. 600, 605 (S.D. Fla. 1988)(finding no congressional authority granting the federal courts remedial power to require the State to pay funds for

the alleged denial of due process arising out of the State of Florida's seizure of the State of Florida's seizure of monies from plaintiff's bank account to recover the proceeds from welfare, social security, and income tax refund checks allegedly cashed illegally). Additionally, the Court finds that the State of Florida has not waived its immunity from suits for allegedly unconstitutional takings of property. Orange Ridge, 696 F.Supp. at 606. The Court finds that the due process taking claim in this case is barred by the Eleventh Amendment.

Upon consideration of the foregoing, it is hereby **ORDERED and ADJUDGED** that:

(1) Defendant's Suggestion of Mootness, or In the Alternative, Motion for Summary Judgement due to State's Eleventh Amendment Immunity (Dkt. 90) is **GRANTED**.

(2) Plaintiff's Motion and Notice to Set Cause for Trial (Dkt. 93) is **DENIED**.

(3) The Clerk is **DIRECTED** to enter judgement in favor of the Defendants Florida Game and Fresh Water Fish Commission. Donald

Wood, Frank Montalbano, III, and Brian Millsap.[1] The Clerk is further **DIRECTED** to close the file on this case.

DONE AND ORDERED, at Tampa, Florida, this 11th day of December, 1995.

/s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record
John Gay, Courtroom Deputy Clerk
Margaret Costa, Legal Assistant

[1] The Court notes that its January 13, 1995 Order granting Defendants' motion for summary judgment did not direct the clerk to enter judgment in favor of the individual Defendants.

Supreme Court U.S.
FILED
SEP 9 1997
CLERK

(2)

No. 97-298

IN THE

Supreme Court of the United States

October Term, 1997

FLOTILLA, INC., a Florida Corporation,

Petitioner,

v.

FLORIDA GAME AND FRESH WATER FISH COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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15 pp

QUESTION FOR REVIEW

WHETHER THE ELEVENTH AMENDMENT PERMITS A SUIT IN FEDERAL COURT, BY A FLORIDA CORPORATION, AGAINST AN ARM OF THE STATE OF FLORIDA, ABSENT A SPECIFIC LEGISLATIVE WAIVER OF ELEVENTH AMENDMENT IMMUNITY.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

While there were several parties listed on the opinion below, the only real party there, as here, is the Florida Game And Freshwater Fish Commission. Flotilla has acknowledged that in their petition, and therefore respondent's brief in opposition reflects only the one party.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In 1991, Flotilla filed an action in federal court against the Florida Game and Fresh Water Fish Commission ("Commission") seeking monetary damages pursuant to 42 U.S.C. §1983, alleging a violation of its civil rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Prior to the commencement of the federal district court action, Flotilla had filed an inverse condemnation lawsuit in State court against the Commission. In that State court action, Flotilla claimed a violation of due process and equal protection rights pursuant to the Fifth and Fourteenth Amendments to the Constitution. An appeal of the State trial court's

decision resulted in a finding of no taking of Flotilla's property by the Commission. *Florida Game and Fresh Water Fish Commission v. Flotilla,* 636 So. 2d 761 (Fla. 2d DCA 1994), *review denied* 645 So. 2d 452 (Fla. 1994).

Flotilla's allegations in both State and Federal court arose from its attempt to develop a residential subdivision on 173 acres of undeveloped land; the discovery that bald eagles had established nests on a portion of the land; officials from the Florida Game and Fresh Water Fish Commission arriving to investigate possible criminal violations of State and Federal laws pertaining to eagles; and negotiations resulting in the establishment of a buffer area around the eagle nests.

Flotilla claims in their Statement of the Case that "The economic effect of the Commission's actions were absolutely disastrous to Flotilla", the Florida appellate court commented on that allegation (likewise made in the state court proceeding), as follows:

> Significantly, each phase of the project, except for the 24 acre preserve on phase four, was eventually sold to private contractors, although some at prices less than what Flotilla had hoped for.

Florida Game and Fish Commission v. Flotilla, 636 So. 2d at 763.

As Flotilla correctly discusses in their Statement of the Case, the Federal district court granted summary judgment in favor of the Commission, which judgment was affirmed on appeal to the Eleventh Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

I. The decision of the appellate court is not in conflict with any applicable Eleventh Amendment immunity decisions and the court did not hold that the status of the entity being sued, as opposed to the status of state law, determines whether or not a suit is against the state for Eleventh Amendment purposes.

This Court has made it clear that the Eleventh Amendment is a jurisdictional bar prohibiting suits in Federal court against states by their citizens. *Welch v. Texas Department of Highways and Public Transportation,* 483 U.S. 468 (1987); *In re New York,* 256 U.S. 490 (1921). More recently, this Court reaffirmed that immunity in *Seminole Tribe of Florida v. Florida,* __ U.S. __, 116 S.Ct. 1114 (1996), as follows:

> For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States."

Hans, supra, at 15, 10 S.Ct., at 507. *Seminole Tribe of Florida,* 116 S.Ct. at 1122.

Flotilla has totally confused Eleventh Amendment immunity with State sovereign immunity. Eleventh Amendment immunity and sovereign immunity, while related, are doctrinally distinct, as recognized in *Hufford v. Rodgers,* 912 F. 2d 1338 (11th Cir. 1990). The Eleventh Amendment, a Constitutional provision, deals only with Federal jurisdiction to hear suits against the State, not with the State's immunity from suit in any forum. The Eleventh Amendment insulates the State from private parties seeking to impose damages in Federal court which must be paid from public funds. State

sovereign immunity, on the other hand, is a common law doctrine which serves to insulate States from lawsuits in their own courts.

Flotilla predicates its Petition to this Court on *State Road Department v. Tharpe,* 1 So. 2d 868 (Fla. 1941), claiming that under the facts in *Tharpe,* the Supreme Court of Florida found a waiver of sovereign immunity, that, according to Flotilla should carry over to the case before this Court. *Tharpe has no applicability to this case nor to any discussion of Eleventh Amendment immunity.* Eleventh Amendment immunity was never mentioned in *Tharpe.* The court said that the then existing laws of Florida (1941) permitted a suit against the State *in State court* for inverse condemnation or breach of contract. *Tharpe,* 1 So. 2d at 860. More importantly, *Tharpe* predated Article 10, Section 3, Florida Constitution (1968) which says:

> Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

In 1973, the Florida Legislature enacted §768.28, Florida Statutes which was a limited waiver of immunity for tort actions in *State courts,* and specifically preserved Florida's Eleventh Amendment immunity from suit in Federal courts, "unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court." §768.28 (17), Florida Statutes.

This Court has previously held, on more than one occasion, that a State does not waive Eleventh Amendment immunity in Federal court by waiving sovereign immunity in its own courts. *Welch v. Texas Department of Highways,* 483 U.S. 468 (1987); *Pennhurst State School v. Halderman,* 465 U.S. 89 (1984). *See also, Schopler v. Bliss,* 903 F. 2d 1373 (11th Cir. 1990) and *Tuveson v. Florida Governor's Council on Indian Affairs,* 734 F. 2d 730 (11th Cir. 1984). Lest there be any doubt, Florida has not waived its Eleventh Amendment

immunity. *Seminole Tribe of Florida v. State of Florida,* 11 F. 3d 1016 (11th Cir. 1994), *affirmed* __ U.S. __, 116 S.Ct. 1114 (1996); *Gamble v. Florida Department of HRS,* 779 F. 2d 1509 (11th Cir. 1986).

In addition to the *Tharpe* State court decision, Flotilla bases its Petition to this Court on two other cases, neither of which supports Flotilla's argument. However one case supports the Commission's argument in opposition to the Petition. Flotilla cites *Ford Motor Co. v. Department of Treasury, Etc.,* 323 U.S. 459 (1945), for the proposition that the Federal courts should look to State law in determining a State immunity question and whether or not there has been a waiver thereof. In the *Ford Motor Co.* case this Court reiterated that the Eleventh Amendment, "denies to the federal courts authority to entertain a suit brought by private parties against the state without it consent." *Ford Motor Co.,* 323 U.S. at 464. This Court went on to say that the only way the State could waive the Eleventh Amendment immunity was by a *legislative act,* which they had not done.

The other case cited by Flotilla, *Aerojet-General Corporation v. Askew,* 453 F. 2d 819 (5th Cir. 1972), is likewise inapplicable because factually, the court found that the subject matter of the lawsuit (land) was not titled in the name of the State of Florida and therefore there was no Eleventh Amendment immunity.

Comment on Flotilla's argument about reference to State law is needed. The Federal courts are required to examine State law in an Eleventh Amendment immunity claim; however it is for the purpose of examining the entity being sued in order to determine if it is an "arm of the State". As this Court recently said in *Regents of the University of California, et.al. v. Doe,* __ U.S. __, 117 S.Ct. 900 (1997):

> When deciding whether a state instrumentality may invoke the State's immunity, our cases

> have inquired into the relationship between the State and the entity in question.

Regents, 117 S.Ct. at 904. And further:

> [T]hat federal question can be answered only after considering the provisions of state law that define the agency's character.

Regents, 117 S.Ct. at 904, n. 5.

The "agency's character" likewise caused the courts below to find that Flotilla's action was brought against an arm of the State of Florida. The inquiry as to what is an "arm of the State" is made by reference to State law and:

> Factors that bear on this determination include the definition of 'state' and 'political subdivision'; the degree of control over the entity; and the fiscal autonomy of the entity.

Harden v. Adams, 760 F.2d 1158, 1163 (11th Cir. 1985).

The Commission specifically comes under the Executive Branch of Florida government, with the head of the Commission being appointed by the governor. §20.325, Florida Statutes; Article 4, Section 6, Florida Constitution. By statute, the headquarters of the Commission is in the State Capitol building or other State owned buildings. §372.03, Florida Statutes. The Commission has the power to acquire, *with the approval of the governor, in the name of the state,* lands for the preservation of game. §372.12, Florida Statutes.

The most significant factor demonstrating that the Commission's umbilical cord is firmly attached to the State is the Commission's dependency on the Legislature for its annual funding. The 1994–1995 fiscal year appropriation for the Commission was $48,000,000.00. Ch. 95-429 at 3939–3942, Laws of Florida (1995). Flotilla's *Ford Motor Co.* case, from

this Court, held that suit is barred against State agencies when the recovery would come from the State treasury. *Ford Motor Co.*, 323 U.S. at 464. That position was expanded this year by *Regents of the University of California*, which held that the entity's potential legal liability is relevant to an Eleventh Amendment question. *Regents*, 117 S.Ct. at 904.

Significantly, the court in *Fouche v. Jekyll Island-State Park Authority*, 713 F.2d 1518, 1520 (11th Cir. 1983), found that:

> Even though the Park Authority can raise money through the issuance of bonds and from the operation of Jekyll Island State Park, its fiscal life is controlled by the state.
>
> As noted above, its budget is submitted to the General Assembly.

Finally, while the Commission generates income from licenses, fines and other sources which go into the State Game Trust Fund, the Commission is prohibited from obligating itself beyond the monies in the Trust Fund, unless authorized by the Legislature. §372.09, Fla. Stat. (1995).

In addition to the above Eleventh Amendment immunity argument, upon which both the trial and appellate courts below based their opinions, it is significant that Flotilla's complaint was specifically brought pursuant to 42 U.S.C. §1983. In 1988, this Court in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1988), determined that States were not "persons" within the meaning of §1983, and held as follows:

> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh

> Amendment bars such suits unless the State has waived its immunity.

Will, 491 U.S. at 66. And in *Pennhurst, supra,* this Court specifically held that Federal courts are barred from granting any relief on a §1983 claim against a State.

Once again, the State sovereign immunity Flotilla argues has no application to claims in Federal court under §1983. Federal law determines whether particular entities are subject to suit. *Hufford v. Rodgers, supra.*

The Eleventh Circuit's decision does not conflict with a decision of another court of appeals, or a decision of the Florida court of last resort. Certiorari review is not warranted. Supreme Court Rule 10(a).

II. This case does not involve any important questions of Federal law that have not been settled.

From *Hans v. Louisiana,* 134 U.S. 1 (1890) to *Seminole Tribe of Florida v. Florida,* __ U.S. __, 116 S.Ct. 1114 (1996), the Eleventh Amendment has been held to be a bar to suits brought against a State in Federal court by its own citizens. As discussed above, Florida law clearly establishes that the Commission is an arm of the State of Florida. Consequently, Flotilla's §1983 claim is effectively against Florida as a State. It is well settled that a State is not a person for actions brought pursuant to 42 U.S.C. §1983, which does not abrogate the Eleventh Amendment.

Under all of the above, well-established principles of law, the Eleventh Circuit's decision was correct. That decision did not decide an important question of Federal law that should be settled by this Court. Again, Certiorari review is not warranted. Supreme Court Rule 10(c).

CONCLUSION

The respondent respectfully requests that the Petition for Writ of Certiorari be denied.

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